FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

JAN 25 2011

Stephan Harris, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

TRICIA WACHSMUTH,

Plaintiff,

v.

CITY OF POWELL, TIM FEATHERS, CHAD MINER, MIKE CHRETIEN, ROY ECKERDT, DAVE BROWN, MIKE HALL, BRETT LARA, MATT McCASLIN, ALAN KENT, MATTHEW DANZER, OFFICER BRILAKIS, LEE BLACKMORE, CODY BRADLEY, KIRK CHAPMAN, and JOHN DOES #1–4,

Defendants.

Case No. 10-CV-41-J

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter came before the Court by *Defendants' Motion for Summary Judgment* (Doc. 52), filed by the City of Powell and the official-capacity defendants and the *Individual Defendants' Motion for Summary Judgment* (Doc. 55). Tricia Wachsmuth filed a single response to both motions, and a hearing was held in open court on January 14, 2011. The Court, having considered the parties' arguments, the pleadings of record, and the applicable law, and being fully advised, finds as follows:

Background

This case stems from the execution of a search warrant on February 24, 2009, in Powell, Wyoming. The claims in the second amended complaint include charges of excessive force under the U.S. Constitution and the Wyoming Constitution and claims for intentional infliction of emotional distress under Wyoming law.

Many of the facts are in dispute, and due to the nature of these motions, will be considered in the light most favorable to the plaintiff, Tricia Wachsmuth. However, a short recitation of the facts will be helpful. The City of Powell obtained a warrant to search Wachsmuth's residence for a marijuana grow operation, obtaining much of their information from a confidential informant who admittedly had a disputatious view towards the Wachsmuths. The officers were investigating Wachsmuth's husband and believed there to be firearms in the house. Moreover, there was some information that it was likely a child was in the residence. There was also some belief on the part of law enforcement that the husband may be somewhat unstable. A plan to was created including the use of a SWAT-like team to execute the warrant. The warrant was served when Wachmsuth was the only person in the house. It is believed her slight stature is what was mistaken for the child entering the house.

Wachsmuth claims the officers breached her door without announcing their presence, lobbed a flashbang device into the bedroom window without adequate justification, held her at gunpoint throughout the search and clearing of the house, and then forced her to act as a human shield as they cleared the basement.

Plaintiff's State-Law Claims

In her second amended complaint, Wachsmuth alleges state-law claims against the individual officers, Chief Feathers, and the City of Powell for intentional infliction of emotional distress against her. She also restates the first eight excessive-force claims as violations of her state constitutional rights. In the motions to dismiss, the defendants argue that the Wyoming Governmental Claims Act, Wyo. Stat. Ann. § 1-39-101, *et seq.*, does not contain an exception to governmental immunity for intentional infliction of emotional distress. The defendants further argue that there is no exception for general state constitutional claims. In her response to the motions, Wachsmuth focused her argument on her 42 U.S.C. § 1983 claims and did not respond to the arguments set forth by the defendants concerning the state-law claims.

U.S.D.C.L.R. 7.1(b)(2)(A) requires parties to respond to arguments set forth in motions for summary judgment within fourteen days. Failure to respond to arguments within those dispositive motions may be deemed as a confession. *Id.* In this case, Wachsmuth did not respond to the defendants' state-law arguments. Without commenting on the substantive merits of defendants' arguments, the Court deems Wachsmuth's failure to respond as a confession. Therefore, the defendants are entitled to summary judgment on the state-law claims. Those claims are dismissed in full.

Section 1983 Claims Against Powell and Official-Capacity Defendants

Summary Judgment

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. Fed. R. Civ. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Thus, a district court may grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *Nelson v. Geringer*, 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most favorable to the party opposing summary judgment. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). The moving party bears the initial burden of demonstrating "the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Once the moving party has supported its motion for summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of a genuine issue of material fact left for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). To do so, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue. *Id.*; *Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

Violations by Official-Capacity Officers

The § 1983 claims against the defendants in their official capacities are essentially claims only against the City of Powell. *Watson v. City of Kan. City*, 857 F.2d 690, 695 (10th Cir. 1998). In order to succeed in such claims, "[a] plaintiff suing a municipality under section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998) (*citing Monell v. Dep't Social*

Svcs., 436 U.S. 658, 694 (1978)).

The defendants argue that based on the two elements, even if a constitutional violation could be found, Powell cannot be held liable because the record is devoid of any policy or custom Wachsmuth alleges violated her rights. Moreover, she cannot show any evidence that such a policy "was the moving force behind" any such constitutional violation. While there is no doubt Chief Feathers was the head policy-maker, the evidence viewed most favorably to her could only possibly show that Chief Feathers approved this particular use of the dynamic entry. These facts cannot sustain the requirement of a policy or custom was the moving force behind the alleged constitutional violations. *See Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997); *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). Therefore, no genuine issue of material fact exists, and defendants are entitled to summary judgment.

Failure to Train

In *Brown v. Gray*, the Tenth Circuit explained that a plaintiff must meet four requirements on top of proving inadequacy of the training to succeed on a failure-to-train claim:

> In order to prevail on a claim against a municipality for failure to train its police officers in the use of force, a plaintiff must first prove the training was in fact inadequate, and then satisfy the following requirements: "(1) the

> officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact[;] and (4) there is a direct causal link between the constitutional deprivation and the inadequate training."

227 F.3d 1278, 1286 (10th Cir. 2000) (*quoting Allen v. Muskogee*, 119 F.3d 837, 841–42 (10th Cir. 1997)).

In this case, the record is replete with extensive training provided for the officers, conducted in various formats, locations, and timeframes. While Wachsmuth argues there was a failure to train, she has not raised a genuine issue of material fact in that regard. The Court need not even consider the remaining four requirements from *Brown*, as Powell and the other defendants are entitled to summary judgment on the perquisite issue of the adequacy of training.

Supervisor Liability

Wachsmuth also claims that Powell and Chief Feathers are liable for his failure to supervise the officers. In *Serna v. Colo. Dept. of Corrs.*, the Tenth Circuit explained:

> Supervisors are only liable under § 1983 for their own culpable involvement in the violation of a person's constitutional rights. To establish supervisor liability under § 1983, it is not enough for a plaintiff merely to show a defendant was in charge of other state actors who actually committed the violation. Instead, the plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights.

455 F.3d 1146, 1151 (10th Cir. 2006) (quotations omitted).

Viewed in the light most favorable to Wachsmuth, the record shows that Chief Feathers's only deliberate act was the discussion about and approval of the plan with Mike Chretien, who had been chosen to lead the group based on his allegedly extensive SWAT experience. Applying *Serna*, the issue here is whether Chief Feathers, as a supervisor, deliberately and intentionally violated Wachsmuth's constitutional rights by approving the search warrant execution plan he knew to be violative of the Constitution. Chief Feathers claims he discussed the requirement to wait a reasonable time with Mike Chretien. However, Mike Chretien states that he had no such conversation with Chief Feathers and his plan stated they would ram the door immediately. Therefore, this Court finds a genuine issue of material fact exists. Accordingly, summary judgment on this issue is improper and is denied.

Section 1983 Claims Against Individual-Capacity Defendants

Summary Judgment and Qualified Immunity

"Qualified immunity is an affirmative defense against section 1983 damage claims available to public officials sued in their individual capacities." *Barney v. Pulsipher*, 143 F.3d 1299, 1309 (10th Cir. 1998). While qualified immunity is regularly claimed in prediscovery motions to dismiss, it can also be claimed in summary judgment. *See, e.g.*, *id.*; *Carr*, 337 F.3d at 1226. However, the Court treats a claim of qualified immunity differently than other issues on summary judgment. *Barney*, 143 F.3d at 1309. "Once a defendant raises the defense, the plaintiff assumes the burden of '(1) coming forward with sufficient facts to show that the defendant's conduct violated the law; and (2) demonstrating that the relevant law was clearly established when the alleged violation occurred.' " *Id.* (*quoting Gehl Group v. Koby*, 63 F.3d 1528, 1533 (10th Cir. 1995)).

Excessive Force

"Claims of excessive force are analyzed under the objective reasonableness standard of the Fourth Amendment." *Gross v. Pirtle*, 245 F.3d 1151, 1158 (10th Cir. 2001) (*citing Graham v. Connor*, 490 U.S. 386, 395 (1989)). "The reasonableness of an officer's conduct must be assessed 'from the perspective of a reasonable officer on the scene,' recognizing the fact that the officer may be 'forced to make split-second judgments' under stressful and dangerous conditions." *Id.* (*quoting Graham*, 490 U.S. at 396–97). In doing so, "a court must scrutinize whether 'the totality of the circumstances justified a particular sort of search or seizure.' " *Holland*, 268 F.3d at 1188 (*quoting Tennessee v. Garner*, 471 U.S. 1, 9 (1985)).

Use of SWAT-like Team

In *Holland ex rel. Overdorff v. Harrington*, the Tenth Circuit determined that the decision to use a SWAT team was subject to Fourth Amendment scrutiny. 268 F.3d 1179, 1191 (10th Cir. 2001). In applying *Garner* to the facts of that case, the Tenth Circuit held the decision to use a SWAT team was not so unreasonable—by itself—as an excessive use of force. *Id.* However, in *Holland*, the Tenth Circuit also recognized under the facts of that case, the defendants who approved the use of the SWAT team had no knowledge the SWAT team would use excessive force while executing the warrant. *Id.*

In this case, a genuine issue of material fact exists as to whether the decision to use the SWAT-like team included knowledge that the team would use excessive force, namely whether the SWAT-like team would immediately breach the door without waiting a reasonable time. Because the warrant was for a knock-and-announce entry, knowledge of the plan to immediately breach the door would constitute excessive force. *Wilson v. Arkansas*, 514 U.S. 927, 935–36 (1995) (recognizing the long-standing principle that an officer must announce his presence and wait a reasonable time before entering). Because a genuine issue concerning this matter exists, the defendants are not entitled to qualified immunity, and summary judgment on the issue is improper.

Use of Flashbang Device

In *United States v. Myers*, the Tenth Circuit applied the *Graham* requirement of objective reasonableness to a dynamic entry team's use of a flashbang device in executing a warrant. 106 F.3d 936, 940 (10th Cir. 1997). The *Myers* court held that use of the flashbang device is not per se unreasonable under an objective standard. *See id.* However, the Tenth Circuit cautioned the use of flashbang devices, most especially in a house with innocent children. *Id.* While the Tenth Circuit ultimately upheld the use of the flashbang in that case, it clearly established a level of reasonableness in that kind of conduct.

In *Kirk v. Watkins*, the Tenth Circuit applied its *Myers* ruling in an unpublished decision with facts sufficiently similar to the case at hand. 1999 WL 381119 (10th Cir. June 11, 1999). In *Kirk*, the issue was not only that a flashbang device was used in the execution of a warrant, but also that it was thrown into a bedroom without looking. *Id.* at *4. In *Kirk*, the Tenth Circuit ultimately granted qualified immunity, but only after recognizing the clearly established authority—*Myers*—was decided after the *Kirk* raid had actually occurred. *Id.*

The facts of this case do not support the same holding. *Myers* was decided in 1997, and *Kirk* followed in 1999. However, a genuine issue of material fact exists in this case; the specific issue is whether the officers were able to see into the bedroom and did see into the bedroom before they threw the flashbang device. Therefore, summary judgment on the issue is not proper and qualified immunity is denied.

Use of Human Shield

Next, Wachsmuth argues that using her as a human shield was excessive force. The defendants argue that "human shield" is merely an argument, and not grounded in law. Instead of Wachsmuth being ordered at gunpoint to lead the team down the stairs, they argue she voluntarily lead them, and instead of their guns being drawn, they were simply in the ready position. Viewing the evidence in the light most favorable to Wachsmuth, this Court finds that "human shield" is an appropriate descriptor of the facts.

Moreover, this Court finds that such actions are clearly unreasonable. The defendants argue that they are entitled to qualified immunity because none of the parties can find any case law dealing with the use of civilians as human shields during the clearing of rooms. However, the Supreme Court has recognized that specific case law matching a certain set of facts is not necessary to find something clearly established. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In *Hope*, the Supreme Court explained:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the

unlawfulness must be apparent.

Id. (internal quotations omitted).

In *Pierce v. Gilchrist*, the Tenth Circuit used *Hope* in fashioning a sliding-scale approach to finding clearly established rights. 359 F.3d 1279, 1298 (10th Cir. 2004) ("The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."). This Court finds that the conduct here is so egregious as to not require a case with the same facts to have been decided previously. Instead, simply applying the *Graham* totality-of-the-circumstances test shows Wachsmuth's right to be free from being used as a human shield was clearly established when it happened in 2009. This Court finds it difficult to imagine any set of facts that would justify what occurred, viewing the facts most favorably to Wachsmuth. Therefore, qualified immunity on summary judgment is denied.

Keeping Plaintiff at Gunpoint

In *Michigan v. Summers*, the Supreme Court explained that officers may "detain the occupants of the premises while a proper search is conducted." 452 U.S. 692, 705 (1981). More recently, the Supreme Court considered the reasonableness of the detention at gunpoint of a naked couple while a search warrant was being executed. *L.A. Cnty. v.*

Rettele, 550 U.S. 609 (2007). In *Rettele*, officers woke and held at gunpoint a couple who were unclothed. *Id.* at 611. The officers held them at gunpoint without allowing them to robe for one to two minutes. *Id.* However, the couple remained at gunpoint until the house had been cleared, which was approximately fifteen minutes. *Id.* at 615. The Supreme Court applied *Summers* and *Graham*, holding the detention reasonable. *Id.* The Supreme Court also made note that the fifteen-minute detention (even with three minutes completely nude) was no where near the level of the detention upheld as reasonable in *Muehler v. Mena*, 544 U.S. 93 (2005), where the plaintiff had been held in handcuffs for up to three hours while the search was being conducted. *Rattele*, 550 U.S. at 615.

Wachsmuth asks this Court to deny qualified immunity in light of the Tenth Circuit's holding in *Holland*. In that case, the Tenth Circuit found that pointing firearms at children (a 14 year-old, an 8 year-old, and a 4 year-old) for the length of the search violated their constitutional rights. However, because Wachsmuth was an adult named in the warrant, this Court instead follows *Retelle*, where the Supreme Court held it reasonable to hold adults (even of a different race than the individuals named in the warrant) at gunpoint while conducting a search. Therefore, this Court grants qualified immunity and summary judgment to the defendants on the issue.

Failing to Knock and Announce

"The Fourth Amendment, reflecting the long common law tradition protecting the sanctity of the home, includes a general presumption that police officers executing a search warrant for a residence must announce their presence and authority before entering." *United States v. Moore*, 91 F.3d 96, 98 (10th Cir. 1996) (*citing Wilson v. Arkansas*, 514 U.S. 927, 935–36 (1995)). Specifically, "[i]f the occupants do not admit the officers within a reasonable period of time, the officers may be deemed to be constructively refused admittance, and they may then enter by force." *Id.*

The question then becomes the length of a "reasonable period of time." In *United States v. Knapp*, "[i]t was plausible for the officers to conclude that they were affirmatively refused entry after a ten to twelve second interval." 1 F.3d 1026, 1031 (10th Cir. 1993). On the contrary, in *Moore*, "the time that elapsed between announcement and battering was no more than three seconds," and the Tenth Circuit held the entry to be unreasonable. 91 F.3d at 98.

In this case, a genuine issue exists as to whether the officers announced and waited a reasonable amount of time before breaching the door. Wachsmuth claims that once she looked out the window, the door was immediately rammed before the officers said anything audible. To the contrary, the officers claim they announced before breaching the door. This amounts to a genuine issue of material fact. *C.f. Holland*, 268 F.3d at 1193–94 (denying qualified immunity on summary judgment because officers' accounts conflicted directly with plaintiffs' accounts).

The defendants also argue that exigent circumstances were present, negating the requirement for announcing their presence. *See United States v. Stewart*, 867 F.2d 581, 585 (10th Cir. 1989); *United States v. Spinelli*, 848 F.2d 26, 29 (2d Cir. 1988). In this case, the only facts known to the officers in addition to those laying the foundation for their knock-and-announce warrant were that a dog barked alerting their presence and that Wachsmuth looked out her window. The defendants cannot point to any law indicating how those facts could satisfy the emergency conditions required for the Court to apply to exigent-circumstances exception to the reasonableness requirement.

Because a genuine issue of material fact exists concerning whether the officers announced their presence and waited a reasonable time, qualified immunity and summary judgment in their favor is denied.

Individual Officers' Liability for the Violations of Others

The defendants ask that each officer be dismissed for lack of involvement in the alleged constitutional violations, because some were located at the back door, some discharged the flashbang, and others were at the front door. However, Wachsmuth argues that each of the officers are individually liable for the constitutional violations committed by the others. As a matter of law, the Tenth Circuit has recognized, "the law was clearly established that a law enforcement official has an affirmative duty to intervene to prevent another law enforcement official's use of excessive force." *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996).

In addition to each officer's actual individual participation in the violations, several were present during many of the alleged actions that have survived summary judgment. Most specifically, they were all present when the entry plan was presented to them. Because a genuine issue of material fact exists as to whether or not that plan included an unconstitutional immediate entry into the residence, this Court cannot grant qualified immunity to each individual officer. Summary judgment is denied.

Conclusion

Therefore, the Court GRANTS IN PART and DENIES IN PART *Defendants' Motion for Summary Judgment* (Doc. 52).

Specifically, the Court GRANTS summary judgment in favor of the defendants on the state-law claims, on the official-capacity claims for the execution of the search warrant, and on the claims for failure to train.

The Court finds a genuine issue of material fact and therefore DENIES summary judgment on the supervisor-liability claim.

Next, the Court GRANTS IN PART and DENIES IN PART the *Individual Defendants' Motion for Summary Judgment* (Doc. 55).

Specifically, the Court GRANTS summary judgment in favor of the defendants on the state-law claims. The Court GRANTS qualified immunity on summary judgment in favor of the defendants on the claim Wachsmuth was held at gunpoint during the execution of the search.

The Court DENIES qualified immunity as a matter of law concerning the claim that the defendants used Wachsmuth as a human shield. Further, the Court finds a genuine issue of material fact and therefore DENIES qualified immunity on summary judgment on the claims concerning the use of the SWAT-like team, the use of the flashbang device, and the failure to knock and announce.

Dated this 25th day of January, 2011.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE